APPENDIX

FILED
DEC 8 1977

Supreme Court of the United States

October Term, 1977

No. 76-1650

United States of America,

Petitioner,

v.

[illegible]

[illegible]

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1629

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY ROBERT WHEELER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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* A copy of the opinion of the United States Court of Appeals for the Ninth Circuit was reproduced as Appendix A to the petition for a writ of certiorari (pp. 1a-8a). The judgment of the court of appeals was reproduced as Appendix B to the petition (p. 9a).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cr. 75-550 Pct.

UNITED STATES

v.

WHEELER, ANTHONY ROBERT

Date	Proceedings
11/19/75	1. Superceding Indictment (1 ct). (prev. case No. CR-75-268 Pct. was dismissed on 8/18/75).
11/19/75	— Minute entry: On motion of Govt., Order that a summons be issued ret. at 12:30 p.m. on 12/1/75 in ctrm #3.
11/19/75	— Issue summons to marshal in dup. plus cc to T. Kleinschmidt, atty.
12/1/75	2. Summons returned by certified mail executed.
12/1/75	— Minute entry: On for arraignment. D. Drake pres. for Govt. T. Kleinschmidt pres. for deft. Deft. not present. Order matter be con't until 12:30 p.m. on 12/8/75.
12/8/75	— Minute entry: On for arraignment. D. Drake pres. for Govt. T. Kleinschmidt pres. for deft. Deft. not present. Order arraign. be held before the Magistrate later on today.
12/8/75	3. Order that trial to commence at 9:00 a.m. on 2/3/76 with a jury.
12/8/75	— Mailed cc re above order to U.S. Atty, T. Kleinschmidt & deft.
12/9/75	4. Record of minutes of arraign. held before Mag. Gormley. Deft. pres. & with counsel T. Kleinschmidt. Deft. pleads not guilty. Order pass for trial setting in District Court.

Date	Proceedings
12/9/75	5. Order specifying methods and conditions of release.
1/15/76	6. Motion to suppress, set for hearing at 11:00 a.m. on 1/26/76.
1/19/76	7. Response to motion to suppress statements.
1/26/76	— Minute entry: Motion to suppress on for hearing. D. Drake pres. for Govt. T. Kleinschmidt pres. for Deft. Deft. not present. Order matter con't until 11:00 a.m. on 2/2/76.
1/28/76	— Minute entry: The Court today ordered that the motion to suppress, set for 2/2/76 and the trial date of 2/3/76 has been vacated and both are reset for 2/5/76. (counsel notified by phone of changes).
2/4/76	8. Stipulation that deft. is an indian.
2/4/76	9. Stipulation that act charged in the indictment happened on the Indian reservation.
2/4/76	10. Affidavit of indigency.
2/5/76	— Minute entry: On for motion to suppress. D. Drake pres. for Govt. Deft. Wheeler pres. & with counsel T. Kleinschmidt. (See exhibit and witness list). Order motion is denied. Further ordered that trial date is vacated and Order that this case be dismissed because of double jeopardy.
2/5/76	— Minute entry: The Court today ordered that doctors Steve Methner and Greg Alexander be paid their travel expenses and witness fees by the marshal. (issued notice to marshal).
2/11/76	11. Transcript of proceedings on deft's motion to dismiss.
3/4/76	12. Pltf U.S.A. Notice of Appeal.
3/5/76	— Copy to: 9th CCA, U.S. Attorney, Probation, U.S. Marshal Magistrate, and Court Reporter.
3/8/76	13. Designation of record on appeal as to Deft Robert Anthony Wheeler.
3/8/76	— Copy to: Crt Reporters, U.S. Atty.

Date	Proceedings
3/24/76	14. Reporter's transcript of proceedings had on February 5, 1976, original and two copies.
3/25/76	15. Motion of Deft. for leave to take depositions, set for hearing at 11:00 a.m. on 3/29/76.
3/25/76	16. Pltf. Designation Of Record on Appeal (AMENDED)
3/25/76	— Copy to: U.S. Atty, U.S. Marshal, Magistrate, Crt Reporter.
3/29/76	— Minute entry: Motion for leave to take depositions on for hearing. D. Drake pres. for Govt. T. Kleinschmidt pres. for deft. Wheeler. Order motion granted and deposition to be taken at convenience of both counsel.
4/5/76	— Record on appeal transmitted to Court of Appeals this date.
4/8/76	17. Notice of taking depositions.
4/19/76	18. Order for Time Schedule from 9th CCA. Copy to U.S. Atty.
4/23/76	19. Application for payment of court reporter and transcript costs and Order thereon. (cc mailed to U.S. Atty, T. Kleinschmidt and G. Denney).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1509

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant:

vs.

ANTHONY ROBERT WHEELER,
Defendant-Appellee:

Date	Filings-Proceedings
Apr. 11, 1976	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. —sr—
Apr. 13, 1976	FILED CERT TRNSC RECORD ON APPEAL IN TWO VOLUMES: VOL. I, PLDGS, THREE CERT. COPIES; VOL. II, RPTRS TRNSC, ORIG. & TWO COPIES. ONE ENVELOPE IN LPS.
Apr. 14, 1976	Filed order (C) the parties, counsel and court personnel in the processing of this appeal will comply with the following time schedule: 1) abstract of record, etc. due no later than 4-5-76; 2) Aplt's opening brief due no later than 5-5-76; 3) Aple's brief due no later than 6-4-76; 4) Aplt's final brief due no later than 6-15-76; 5) this case is now calendared for hearing during the week of 8-2-76; —fn—
Apr. 23, 1976	Filed Appellant's motion to supplement record on appeal to "C"
Apr. 29, 1976	FILED ORDER (C) granting aplt. leave to supplement record on appeal. Subject to reconsideration if any objection raised in seven days. —acb—

Date	Filings-Proceedings
May 6, 1976	Rec'd 4 Aplt's Briefs (USA) 5/4/76 insufficient copies. —dmf—
May 6, 1976	FILED CERT SUPPL RECORD ON APPEAL: 13 PGS OF ADDL PLDGS ADDED TO BACK OF VOL. I.
May 12, 1976	Exhibits in LPS sent back to DC per request of DC. —cjb—
May 13, 1976	Filed 25 Aplt's Briefs (USA) 5-4-76 —dmf—
Jun 3, 1976	Filed 4 Aplee's Briefs (6/1/76) aplee in FP —dmf—
Jun 16, 1976	Filed 25 Aplt's Reply Briefs (6/14/76) —dmf—
Nov. 2, 1976	CAUSE ARGUED & SUBMITTED TO: GOODWIN, SNEED, CJJ & EAST, DJ. jlw
Dec. 2, 1976	ORDERED OPINION (SNEED) FILED & JUDG TO BE FILED & ENTD
Dec. 2, 1976	Filed opinion—AFFIRMED
Dec. 2, 1976	Filed & Entd Judgment. —fn—
Jan. 5, 1977	MANDATE ISSUED
Jan. 14, 1977	Received aplt's Petition for Rehearing with Suggestion for rehearing in banc. ec to panel
Jan. 21, 1977	Filed Aplts (USA) motion to extend time for filing petition for rehearing and suggestion for rehearing in banc. to panel bc
Feb. 10, 1977	Filed order (G & S) The motion by aplt U.S. to extend time for filing petition for rehearing and suggestion for rehearing in banc is granted and the Clerk is instructed to file the petition of the aplt U.S. heretofore rec'd by this court. —fn—
Feb. 10, 1977	Filed aplt's petition for rehearing with suggestion for rehearing in banc which was rec'd Jan. 14, 1977. —fn—

Date	Filings-Proceedings
Mar. 23, 1977	Filed order (G & S, CJJ & EAST, DJ) The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected. —fn—
Apr. 18. 1977	Received copy of clerk (S.C.) to Hon. Wade McCree, Sol. General of the U.S., regarding granting of extension to file certiorari. (On 4-13-77 Mr. Justice Rehnquist granted until May 20, 1977 to file certiorari). ogm
May 31, 1977	R'cvd on May 27 '77, Supreme Court notice of filing petition for certiorari on May 20, 1977, assigned no. 76-1629. ogm

IN THE TRIAL COURT OF THE NAVAJO TRIBE
JUDICIAL DISTRICT OF CHINLE, ARIZONA

No. CL-321-3245-74

Criminal Complaint

THE NAVAJO TRIBE,

Plaintiff,

vs.

ANTHONY WHEELER,

Defendant,

Round Rock, Arizona

The above-named Defendant is charged by this complaint with the Offense of Contributing to DELINQUENCY OF A MINOR in violation of T17, Section 321, Code of the Navajo Tribe, and contrary to the peace and dignity of the Navajo Tribe to wit:

The said Defendant, did on or about the 16 day of October, 1974, within the Jurisdiction of this Court at northwest of LDS church, Many Farms, Arizona,

Willfully and contribute to the delinquency of a minor.

Date: October 18, 1974

Complainant's Signature
(or thumbprint)
BENNIE SHIRLEY, Lt.

Witness to Complainant's Signature
ROGER SHIRLEY

Witness: LAVERNE SHIRLEY
Many Farms, Arizona

Arraigned: Oct. 18, 1974

Plead: Guilty

Disposition: 60 days or $120.00 @ $2.00 per day.

Judge: H. BRUHOUSE

IN THE TRIAL COURT OF THE NAVAJO TRIBE
JUDICIAL DISTRICT OF CHINLE, ARIZONA

No. CL-351-3238-74

Criminal Complaint

THE NAVAJO TRIBE,

Plaintiff,

vs.

ANTHONY WHEELER,

Defendant,

C #52678

DOB: 03-21-52

Round Rock, Arizona

The above-named Defendant is charged by this complaint with the offense of Disorderly Conduct in violation of T17, Section 351, Code of the Navajo Tribe, and contrary to the peace and dignity of the Navajo Tribe to wit:

The said Defendant, did on or about the 16 day of October, 1974, within the Jurisdiction of this Court at northwest of LDS Church, Many Farms, Arizona,

Appear in a public place in an intoxicated and disorderly condition.

Date: October 16, 1974

Witness to Complainant's Signature
ROGER SHIRLEY

Complainant's Signature (or thumbprint)
BENNIE SHIRLEY, Lt.

Arraigned: Oct. 18, 1974

Plead: Guilty

Disposition: 15 days or $30.00 @ $2.00 per day

Judge: H. BRUHOUSE

IN THE TRIAL COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF CHINLE, ARIZONA

Judgment and Mittimus

Case No. CL-321-3245-74

THE NAVAJO NATION,

vs.

ANTHONY WHEELER,

Defendant,

C #52678

Round Rock, Arizona

You, Anthony Wheeler, have pleaded guilty, of the offense of Contributin [sic] to Delinquency of a minor in violation of Title 17 and Section 321 of the Navajo Tribal Code, and in accordance with the mandate of said code. YOU ARE SENTENCED:

To jail for a period of 60 days OR pay a fine of $2.00 per day.

Sentence commences on 10-18-74. Date of release 12-17-74.

You are committed to the custody of the keeper of the Navajo jail at Chinle, Arizona and there to be confined until this judgment has been satisfied.

Dated this 18th day of October, 1974.

HOMER BRUHOUSE
Judge

MITTIMUS

To: THE KEEPER OF THE JAIL AT CHINLE, ARIZONA.

You are hereby ordered to take and receive and safely keep the person of Anthony Wheeler until (he)(she) has satisfied the above judgment.

Dated this 18th day of October, 1974.

HOMER BRUHOUSE
Judge

Where sentence is suspended, mittimus is not signed.

All sentences commence at 9:00 a.m. on day of sentence and twenty-four hours are considered one day.

IN THE TRIAL COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF CHINLE, ARIZONA

Judgment and Mittimus
Case No. CL-351-3238-74

THE NAVAJO NATION
vs.
ANTHONY WHEELER,
Defendant,

C #52678
Round Rock, Arizona

You, Anthony Wheeler, have pleaded guilty, of the offense of Disorderly Conduct in violation of Title 17 and Section 351 of the Navajo Tribal Code, and in accordance with the mandate of said code. YOU ARE SENTENCED:

To jail for a period of 15 days OR pay a fine of $2.00 per day.

Sentence commences on 10-18-74. Date of release 11-02-74.

You are committed to the custody of the keeper of the Navajo jail at Chinle, Arizona and there to be confined until this judgment has been satisfied.

Dated this 18th day of October, 1974.

HOMER BRUHOUSE
Judge

MITTIMUS

To: THE KEEPER OF THE JAIL AT CHINLE, ARIZONA.

You are hereby ordered to take and receive and safely keep the person of Anthony Wheeler until (he)(she) has satisfied the above judgment.

Dated this 18th day of October, 1974.

HOMER BRUHOUSE
Judge

Where sentence is suspended, mittimus is not signed.

All sentences commence at 9:00 a.m. on day of sentence and twenty-four hours are considered one day.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY ROBERT WHEELER,
Defendant.

INDICTMENT
CR. 75-268 PCT.
VIO: 18 U.S.C. § 1153 and ARS 13-252
(CIR—Assault)

THE GRAND JURY CHARGES:

On or about the 16th day of October, 1974, in the District of Arizona, on and within the Navajo Indian Reservation, Indian Country, ANTHONY ROBERT WHEELER, an Indian male, did assault Corina Rose Totsonie, an Indian female, not then his wife, with intent to rape said Corina Rose Totsonie.

In violation of Title 18, United States Code, Section 1153 and Arizona Revised Statutes 13-252.

A TRUE BILL

Signature Illegible .....
FOREMAN OF THE GRAND JURY
Dated: May 21, 1975

WILLIAM C. SMITHERMAN
United States Attorney

Signature Illegible .....
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY ROBERT WHEELER,
Defendant.

SUPERSEDING INDICTMENT
NO. CR. 75-550 PCT.
VIO: 18 U.S.C. § 1153 and § 2032
(CIR—Carnal Knowledge of a Female Under Sixteen Years)

THE GRAND JURY CHARGES:

On or about the 16th day of October, 1974, in the District of Arizona, on and within the Navajo Indian Reservation, Indian Country, ANTHONY ROBERT WHEELER, an Indian male, did carnally know a female Indian named Corina Rose Totsonie, not his wife, who had not then attained the age of sixteen years but was fifteen years of age.

In violation of Title 18, United States Code, Sections 1153 and 2032.

A TRUE BILL

Signature Illegible ....
FOREMAN OF THE GRAND JURY
Dated: November 19, 1975

WILLIAM C. SMITHERMAN
United States Attorney

Signature Illegible ....
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cr. 75-550 PCT.
WPC

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY ROBERT WHEELER,
Defendant.

TRANSCRIPT OF PROCEEDINGS
ON DEFENDANT'S MOTION TO SUPPRESS

BEFORE:

HON. WILLIAM P. COPPLE, JUDGE
Phoenix, Arizona
February 5, 1976
9:00 a.m.

APPEARANCES:

For the Government:
MR. DANIEL R. DRAKE
For the Defendant:
MR. TOM KLEINSCHMIDT

[3] PROCEEDINGS

THE CLERK: Cr. 75-550 Prescott, United States v. Anthony Robert Wheeler, motion to suppress.

MR. DRAKE: Government is ready to proceed, Your Honor.

MR. KLEINSCHMIDT: Defendant is ready, Your Honor.

THE COURT: Is this motion to suppress directed solely to the statement on the Miranda basis?

MR. KLEINSCHMIDT: Yes, Your Honor.

THE COURT: Okay. Call your witness.

MR. DRAKE: Call Bennie Shirley to the stand, please.

BENNIE SHIRLEY,

called as a witness by the Government, being first duly sworn, testified as follows:

THE CLERK: State your name.

THE WITNESS: Bennie Shirley.

MR. DRAKE: Before I start with Mr. Shirley, I'd like to ask Mr. Kleinschmidt if he intends to make a motion to suppress a statement made to Mr. Shirley?

MR. KLEINSCHMIDT: Yes, I do, Your Honor.

[4] DIRECT EXAMINATION

BY MR. DRAKE:

Q Would you state your name and occupation?

A Bennie Shirley, the rank of lieutenant.

Q Calling your attention to October 16 of 1974, were you so employed as a Navajo policeman?

A Yes.

THE COURT: What was that date?

MR. DRAKE: October 16 of 1974.

Q BY MR. DRAKE: Were you on duty that evening?

A No, I was off duty.

Q Did you have occasion to be involved in an investigation of a possible crime?

A Right.

Q Where did this take place?

A Many Farms, Arizona.

Q What did you do with respect to the investigation?

A I responded to the call, but mostly just the surrounding area at the scene where the alleged crime had taken place, I responded to that location.

Q Did you encounter Anthony Wheeler?

A Right.

Q Where did you encounter him?

[5] A At the time I arrived at the scene, he was in the vehicle, pickup truck.

Q And do you recall what type of pickup truck this was?

A It's a green Chevrolet, half-ton pickup.

Q What did you do with respect to Mr. Wheeler?

A At the time I got to the site of the parked vehicle, I saw a head rising, so I know for a fact somebody is in there in the parked vehicle, so I went ahead and investigated.

Then right there I recognized Mr. Anthony Wheeler, I identified him as he pretended to be in a sitting position in the——

Q You say you identified him. Were you familiar with him?

A I am familiar with the person.

Q Did you identify yourself?

A Right, I identified myself as a police officer.

Q Were you in uniform at that time?

A In civilian clothes.

Q What, if anything, was said between you and Mr. Wheeler?

A He didn't say much, kind of mumbled for a [6] while. After I had gotten him out of the vehicle, he did say "I was helping the girl."

Q Was this in response to a question?

A No. I didn't ask him, because I made sure that I identified myself as a police officer and he doesn't have to say anything or doesn't have to make any comments, and right then and there I gave him the rights and identification to make clear that he recognized me as a police officer, too.

So I repeated "My name is Bennie Shirley and I'm a police officer, Mr. Wheeler."

Q Was this before he made the statement or after he made the statement?

A After he made the statement "I was just helping the girl."

Q Did he make the statement again?

A He did repeat it again, "I was just helping this girl."

Q Was this after the rights, then?

A Then afterwards I gave him the rights, I said, "Anthony, you have the right to remain silent and you don't have to tell me anything. I have to make sure that you know you have your rights as an individual, so——"

Q Did he repeat the statement to you after [7] that point?

A He did, he repeated it again, "I was just helping this girl."

MR. DRAKE: Nothing further.

Q Oh, did you make any attempt to interrogate or interview him that day?

A No, because I gave him the rights right then and there, "You have the right to remain silent and you don't have to say anything or you don't have to tell me anything."

Q But did you attempt to interrogate him that evening?

A No, I didn't.

Q What was done with Mr. Wheeler that evening?

A The only thing I mentioned, "I have to place you under arrest for this alleged crime."

Q Was Mr. Wheeler booked into jail that evening?

A Afterwards, he was booked in.

Q And do you know if he saw a magistrate or officer of the court sometime after he was booked in?

A No. He was just booked in.

Q Do you know if he saw one the next day?

A I didn't see him.

[8] THE COURT: Did you have anything else to do with this case after that?

THE WITNESS: I filed a criminal complaint.

THE COURT: Is that all?

THE WITNESS: That's all.

THE COURT: Did you interview the defendant any more after that?

THE WITNESS: No, sir.

THE COURT: Did you ever talk to him about it again after that?

THE WITNESS: No, sir.

MR. DRAKE: Nothing further.

CROSS-EXAMINATION

BY MR. KLEINSCHMIDT:

Q Lieutenant, I understand that he said something, then you advised him of his rights, then he said something again; is that correct?

A He repeated again the same——

Q Did you make a report about this?

A I did make a report.

Q Where is your report? Do you have it?

A Just a written statement, that's all.

Q May I see it, please?

(Witness producing document.)

[9] A This is a statement to the investigating officer.

MR KLEINSCHMIDT: May I have this marked, Your Honor?

THE COURT: Yes.

THE CLERK: Defendant's A.

(Defendant's Exhibit A marked for identification.)

Q BY MR. KLEINSCHMIDT: Lieutenant, have you read this report recently?

A Right.

Q It doesn't say anything about him making a statement at all, does it?

A Right. I found out that I left out that particular statement.

Q Did you make a statement to the FBI about this?

A No, just to Mr. Frank Adakai, Agency Special Officer.

Q Did you tell him what you testified here to today, that you made a statement—or that the defendant made a statement and then you advised him of his rights and then he made a statement again?

A Right, he had repeated the——

Q Did you tell that to Mr. Adakai?

[10] A At that time I did not mention that but I did recall that he said "I was only helping the girl." That's about all.

Q When did you recall that he made a statement and then you advised him of his rights and then he made a statement? When did you recall that?

A When he was trying to say that "I was only helping the girl," right there I stopped him from talking to me. That's when I gave him the rights to remain silent.

Q Now, Mr. Wheeler was very, very drunk that night, wasn't he?

A Right.

Q Could he stand up?

A He did stand up.

Q Did he pass out in the police car?

A No, he was getting back to normal.

Q But he was very drunk?

A He was intoxicated.

Q What did he do? How did you know he was intoxicated?

A I could smell the odor of liquor from him, his clothing was disarranged and blood stain on his face, on the cheek, right side.

And then I know for a fact he was under [11] the influence of liquor, smelled liquor, and then the way he appeared, bloodshot eyes, and then I could still—after I got him out of the vehicle, I could still smell intoxicating liquor.

Q And he mumbled, you said earlier that he mumbed his words?

A Right, when he tried to say "I was only helping the girl." I could recall he kept repeating.

Q Did he stagger around?

A He didn't.

MR. KLEINSCHMIDT: Those are all my questions.

THE COURT: Anything else, Mr. Drake?

MR. DRAKE: No, no further questions.

THE COURT: Thank you, Officer Shirley. You may step down.

MR. DRAKE: Call Frank Adakai.

FRANK ADAKAI,

called as a witness by the Government, being first duly sworn, testified as follows:

THE CLERK: State your name.

THE WITNESS: My name is Frank Adakai.

[12] DIRECT EXAMINATION

BY MR. DRAKE:

Q Would you, please, state your name and occupation?

A Yes. My name is Frank Adakai and I am a criminal investigator for the Bureau of Indian Affairs working out of Chinle, Arizona.

Q Calling your attention to October 16 of 1974, Mr. Adakai, did you have occasion to investigate a crime that night?

A Yes, I did.

Q And who was the defendant or suspect in that crime?

A Mr. Anthony Robert Wheeler.

Q Where did you first encounter Mr. Wheeler that evening?

A My first encounter with Mr. Wheeler was at the scene where he was being detained by Lieutenant Bennie Shirley, and that being within the confines of the Many Farms Bureau of Indian Affairs High School compound.

Q Now, what took place when you arrived upon the scene?

A Upon arriving at the scene where Mr. Wheeler was being detained, I noticed that [13] Mr. Wheeler was in a spread-eagle or in a search position, leaning up against the vehicle, and Lieutenant Shirley standing next to him.

Q What, if anything, was said?

A Of course, as soon as I drove up, I immediately recognized Anthony Wheeler because I have known Mr. Wheeler and he has been very close to our family, so right away I did identify him, and as soon as I got out of the vehicle, walked over to where they were, Mr. Wheeler recognized me and greeted me and I did the same thing and, of course, right away I noticed that Mr. Wheeler was intoxicated and his appearance was to the extent where he only had a tee shirt on, a vest-type tee shirt that was torn, one of the shoulder straps was torn.

And, of course, I did receive the report initially of what had happened from Lieutenant Shirley's wife, who was responsible for contacting me at the house.

Q What, if anything, was said upon your arrival at the scene between you and Mr. Wheeler other than the brief hellos or greetings that you exchanged?

A Mr. Wheeler's only comment, he, without being questioned or anything, made a statement, as soon as he saw me arrive there, that he was in the process [14] of assisting the girl who had been attacked by several other boys, and during the process the boys had jumped him and then beaten him up.

Of course, I did not question him that night. Lieutenant Shirley advised me that he was in custody for a misdemeanor

offense of disorderly conduct, and like I say, he was intoxicated that night, so I did not question him, I did not talk to him at all.

Q Was he booked into jail that evening?

A He was, yes.

Q Do you know if he was taken before a Magistrate or judicial officer the next day?

A I was busy with the on-the-scene investigation but I know he was in custody, and that is usually the procedure with the police department, that if the judge is there, the tribal judge, then, of course, they are immediately arraigned.

Q Was the tribal judge there the following morning?

A I do not know, sir. Like I say I was out in the field, following up on the investigation.

Q Now, did you have occasion to talk to Anthony Wheeler again?

A Yes. My next encounter with Mr. Wheeler was on October 6th—excuse me—October 17th at [15] 6:00 p.m., when I came back from the field.

Q Where did you encounter Mr. Wheeler?

A Mr. Wheeler was still in custody at the Navajo police jail in Chinle, Arizona.

Q About what time was this?

A 6:00 o'clock.

Q Did you talk to him that afternoon?

A Yes, I did.

Q Where did this discussion take place?

A The discussion took place at the Navajo police building.

Q More particularly, sir, where in the building?

A In one of the offices inside the main building.

Q Who was present during this discussion?

A Mr. Wheeler and myself.

Q And what, if anything, was said at the outset?

A Of course, he knows who I am, but I identified myself again and I advised Mr. Wheeler that I was in the process of investigating a complaint of rape which had been brought to my attention and that I had been out in the field all that day conducting the investigation.

[16] Of course, I explained to Mr. Wheeler that before we talk to anyone who are in the accusatory stage, before we talk to anyone, we usually advise them of their rights. And I had one of the rights forms which I immediately took out and I asked Mr. Wheeler to read it.

Q Did he read it?

A Which he did, and I asked him if he understood. Mr. Wheeler assured me he understood.

I then read the rights form to him in English, and in the process, there were five points that I made sure that he understood.

Q Now, Officer Adakai, was Mr. Wheeler asked to sign this form?

A After he assured me he understood his rights, yes.

(Document handed to witness.)

Q I show you what has been marked now for identification as Government's Exhibit 1.

Is that the form that Anthony Robert Wheeler signed that morning—that afternoon?

A Yes, sir. I have t' place where he was contacted, the date of October 16th and, of course, the time at 6:05, Mr. Anthony Wheeler signed it and I affixed my name in the area where it says "witness."

[17] Q Now, did you explain or amplify the rights contained in this document?

A Yes, sir, I did.

Q Now, you say you have known Anthony Wheeler, is that correct?

A Yes, sir.

Q How long have you known him?

A We have known Anthony for about a good three years before this particular incident took place.

Q And did Mr. Wheeler have any trouble or have you had any difficulty speaking with Mr. Wheeler in the past in English?

A No. I know Mr. Wheeler is very fluent in the English language. I know that he understands the language fairly well, because my wife does not speak Navajo and, of course, when he comes to our house, we carry our conversation in

the English language and I know he understands English very well.

Q And did Mr. Wheeler give you a statement that day?

A Yes, he did, a verbal statement. This is an unsigned statement.

Q Did you have any difficulty understanding Mr. Wheeler during the conversation?

A No. He expressed himself very well.

[18] MR. DRAKE. Your Honor, I would offer the exhibit marked for identification as Government's 1.

THE COURT: Have you seen it, Mr. Kleinschmidt?

MR. KLEINSCHMIDT: Your Honor, is that——

THE COURT: That is the waiver.

MR. KLEINSCHMIDT. We don't object.

THE COURT: May be admitted for the purposes of this hearing.

(Government's Exhibit 1 received in evidence.)

CROSS-EXAMINATION

BY MR. KLEINSCHMIDT:

Q Mr. Adakai, when you saw Mr. Wheeler on the scene that evening of October the 16th, where was that, again?

A That was within the confines of the BIA high school fenced compound.

Q And that would be northwest of the LDS church at Many Farms?

A That would be, yes, right.

Q Do you have a report you submitted about this incident that occurred, what happened when you went out there to the scene that night?

[19] A It's contained in my investigative report.

Q Do you have that with you?

A Yes.

Q May I see that?

(The witness producing document.)

Now, was he very drunk, Mr. Adakai?

A He was intoxicated.

THE COURT: Wait a minute. At which time?

MR. KLEINSCHMIDT: At the scene.

THE WITNESS: He was intoxicated.

Q BY MR. KLEINSCHMIDT: Now, you saw him the next day at the jail?

A Yes.

Q And you gave him the rights?

A Yes, sir.

Q And then you asked him some questions and he answered them, is that right?

A After he waived his rights, yes.

Q But the statement he gave to you was in response—You asked him questions and he answered them?

A He more or less gave me a narrative account of his activities during that—during the day prior to the incident and leading up to the incident.

[20] Q Did you write everything down that he said?

A What he told me, yes.

Q But you did ask him some questions, didn't you?

A If I recall, his excuse was similar to what he advised me the night before, where he was in the process of assisting the girl and, of course,——

THE COURT: Wait a minute. The question was: Did you ask him any questions, yes or no?

THE WITNESS: Yes, I did.

THE COURT: Okay.

MR. KLEINSCHMIDT: Thank you. Nothing further, Your Honor.

THE COURT: Mr. Drake?

MR. DRAKE: No redirect.

THE COURT: Thank you, Mr. Adaikai, you may step down.

MR. DRAKE: No further witnesses.

MR. KLEINSCHMIDT: We have nothing further on this motion, Your Honor, and we will submit——

THE COURT: What is the basis for your motion?

MR. KLEINSCHMIDT: Well, Your Honor, first of all as to the statements made to Lieutenant Shirley, [21] he made a statement before he was advised of his rights.

THE COURT: I consider that a volunteered statement under the evidence so far. Go ahead.

MR. KLEINSCHMIDT: We have nothing further to submit, Your Honor.

THE COURT: Very well. Motion is denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR. 75-550 PCT.

WPC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY ROBERT WHEELER,

Defendant.

TRANSCRIPT OF PROCEEDINGS
ON DEFENDANT'S MOTION TO DISMISS

BEFORE:

HON. WILLIAM P. COPPLE, JUDGE
Phoenix, Arizona
February 5, 1976
9:00 a.m.

APPEARANCES:

For the Government:
MR. DANIEL R. DRAKE
For the Defendant:
MR. TOM KLEINSCHMIDT

PROCEEDINGS

[2] MR. KLEINSCHMIDT: One further thing, Your Honor. I would like to make another motion, which will just take a minute, and that is a motion to dismiss the indictment on the grounds that this prosecution constitutes double jeopardy. I will put the witness on, if the Government wants.

I have a certified copy of the defendant's conviction and of the complaint filed in the Tribal Court at Chinle.

THE COURT: Why do you wait until today, with a jury waiting outside, to make that kind of a motion?

MR. KLEINSCHMIDT: Your Honor, let me explain this. There was reference in the Government's file to the defendant's arrest. There was no reference at all to any judicial proceedings—or at least none that I saw—to any judicial proceedings on this matter in the Tribal Court. I was unaware of that.

Well, I want to be entirely candid with the Court. I was earlier than this time aware of it only in a very peripheral manner and I did not know that the charge in the Tribal Court constituted the one that we have here today. I found that out later when [3] I made—or this week when I made inquiry to the Tribal Court, itself, and found out that Mr. Wheeler was convicted of contributing to the delinquency of a minor for an incident that occurred at Many Farms northwest of the LDS church on the 16th of October of 1974.

I would say this, Your Honor: There is a difficulty, there is some difficulty, as I'm sure the Court is aware, in communicating with Navajos, and they do not always understand everything that is important in a case.

And I'm sorry it's made at this time, but I think it is a meritorious motion and today is the first day that I had the documents to back the motion up.

THE COURT: Mr. Drake, what do you know about this?

MR. DRAKE: Your Honor, this is the first I've heard of it and I am right now in the process of asking——

THE COURT: If he has been tried on the criminal charge arising out of the same incident, how are you going to avoid a double jeopardy dismissal?

MR. DRAKE: Your Honor, I believe that the elements required and the evidence required for [4] contributing to the delinquency——

THE COURT: That is obviously a lesser included offense, the same facts, the same evidence, the same victim and the same defendant, as I understand it, and if those facts are true, I'm going to have to dismiss it. It should have been determined a long time ago. The prosecution should have determined that before they ever went to the grand jury with an indictment on it, if those facts are true.

MR. DRAKE: I understand that, Your Honor. I again would say that contributing to the delinquency is not necessarily a lesser included offense. I believe such an action can

take place if the minor is kept out after curfew, an adult is found with that minor.

THE COURT: Well, now, wait a minute. In this particular case he was charged with what? This was not a curfew violation.

MR. DRAKE: He was charged with contributing to the delinquency.

THE COURT: Under the same facts as alleged in your indictment, right, the same indictment?

MR. DRAKE: Yes, I would submit it is the same indictment.

THE COURT: Then how are you going to get away from it? He has already been tried and [5] convicted for a crime arising out of the same indictment and it is a lesser included offense in your carnal knowledge indictment. It's like trying a man for second degree murder and then turning around and trying him for first degree murder for the same thing. Would you do that?

MR. DRAKE: I would not do that, no.

THE COURT: Then how are you going to distinguish it, Mr. Drake?

MR. DRAKE: I would have to check the facts a bit more than I have had an opportunity at this point, Your Honor. I would ask a brief recess so that I might converse with Mr. Adakai and Mr. Shirley, the officers involved, and also Mr. Kleinschmidt as to the certified copies. The only ones I've seen here refer to disorderly conduct.

THE COURT: I imagine Mr. Adakai has some familiarity with it, I would think.

MR. DRAKE: I would also like a chance to see the statute involved, to see what elements are required for that.

THE COURT: It's not a case of what elements are required for this particular thing so much as it is did the same physical acts and facts—were they the basis for the conviction in that case.

[6] There are different elements in first degree and second degree murder, Mr. Drake, but you certainly wouldn't quarrel with the fact you can't try a man, convict him of second degree murder and turn right around and retry him for first degree murder, even though the elements are different.

MR. DRAKE: That's true, Your Honor. I would like an opportunity to look at it and see what is involved. I realize it grows out of the same incident, might require different evidence—with the Court's approval.

THE COURT: Well, frankly, I think you are out of business. We will take a recess until 10:30. Tell Jones to divert the jury and tell them to come back at 11:00 o'clock, and as soon as you get the courtroom cleared, round everybody up and tell Lee to bring this other jury back in.

MR. KLEINSCHMIDT: Your Honor, while the Court is still in session, may we put this in evidence (indicating)?

THE COURT: Yes, it may be admitted as Defendant's—whatever it is.

MR. KLEINSCHMIDT: Is a certified copy sufficient, Your Honor?

THE COURT: They are sufficient for me, [7] unless there is some reason to doubt it shown by the Government and Mr. Adakai.

MR. DRAKE: I have no reason at this point, Your Honor. I may have to later investigate.

THE COURT: You better see what you can find, but I think you just finished your case.

(Defendant's Exhibit B marked for identification and received in evidence.

(Recess.

(Further proceedings in open court, the defendant and both counsel present:)

THE COURT: What did you find, Mr. Drake?

MR. DRAKE: Your Honor, we are faced with two major things. First of all, there is not an identity of sovereignties between the Navajo Tribal Courts and the courts of the United States. Much as an individual could be tried in the state court in Arizona for theft of property and be prosecuted in the federal court for interstate transportation of that same property, I submit——

THE COURT: Well, now, wait a minute. Those are two different sets of facts arising out of both the theft and the interstate deal, and I'm not so sure that you are on good ground there, anyway. The difference in sovereignty makes no difference. The [8] double jeopardy attaches whether it is

state or federal. If you are tried on the same thing in one court, you cannot then be tried on the same thing in the other court.

Here you have got a clear lesser included offense arising out of the same charge.

MR. DRAKE: Your Honor, I don't have too much research on that point. However, I would point out——

THE COURT: Did you do any?

MR. DRAKE: Yes, I did.

THE COURT: What did you find?

MR. DRAKE: All right. On that first point I raised, I would refer the Court to U.S. vs. Lanza, 260 U.S., 377.

THE COURT: What does it say that is pertinent?

MR. DRAKE: It's saying that there is not an identity of sovereignties; therefore, double jeopardy does not necessarily attach.

THE COURT: Are you telling me that a man can be tried for murder in state court and acquitted and then turn around and retried, if there is a jurisdictional basis for it, in federal court, and the mere fact they are in two different sovereignties [9] eliminates the constitutional guarantee against double jeopardy? Is that what you are trying to tell me?

MR. DRAKE: No. The situation that you posed involves a determination of the facts favorable to the defendant, and under Ashe v. Swenson, another Supreme Court case, the individual acquitted in state court could not be retried in federal court.

THE COURT: How about a man who is convicted in Tribal Court and then being retried in federal court for a greater offense arising out of the same act?

MR. DRAKE: All right. The same act or same transaction is not the governing test as far as double jeopardy is concerned. Ashe v. Swenson in the dissenting opinion made some mention of a same-transaction test. However, that's never been adopted by the Supreme Court.

I would point out that the Second Circuit has specifically rejected such a same-transaction test, and so has the——

THE COURT: But under what legal proceedings factually?

MR. DRAKE: In the Second Circuit opinion, it is U.S. vs.

Cioffi, and that appears at 487 F. 2d, 492. That was an appeal from the judgment of the [10] District Court of the Eastern District of New York.

Now, it was somewhat different there, but they addressed the double jeopardy question and pointed out that "The true test remains that the formulation was stated back in 1871 that the evidence required to support a conviction upon one of them . . .", the indictment or allegations here, ". . . would have been sufficient to warrant a conviction upon the other"; in other words, the same-evidence test. They went on to speak to that further.

Well, let me go on to the other one. This is an Eighth Circuit opinion, Moton v. Swenson, citation on that is 488 F. 2d, 1060, and in this case it was a habeas corpus writ that came up and there the appellant argued that the separate charges arising out of the same episode must be tried together or, in essence, that they must involve the same offense and a determination of one is a determination of both.

The court went on to reject that and said "We do not believe that the same-evidence test for the offense has been supplanted by the same-transaction test, the former remaining the test to be applied save under such circumstances as may fairly come within the collateral estoppel doctrine of Ashe v. Swenson."

Ashe v. Swenson again is a situation we [11] posed earlier where a man was acquitted in state court on a murder and then retried subsequently in another court.

Now, I would point out that Cioffi, the Second Circuit opinion, has gone up on certiorari and cert. was denied. So, basically what I'm saying to the Court at this time is that the same-evidence test does not preclude the proceeding here in this court.

In specific I would refer to the portion of the Navajo Tribal Code as cited in the complaint to which Anthony Wheeler entered a plea. That was Section 321 of Title 17, and that appears in a subchapter under the title "Children", and the specific section is titled "Contributing to the delinquency of a minor."

Now, there is no distinct definition pointed out that I was able to find in Title 17, criminal (sic) section, of the term "Contributing to the delinquency of a minor." However,

looking to other subsections or sections within the subchapter "Children", one finds "curfew" a definition of "abroad" and exceptions to that, penalties to be imposed upon one who allows their child to——

THE COURT: All of that is clearly immaterial to the case here. My question is that what he pled guilty to was the same act, that is, the same [12] assault, whether termed rape or not, but the same event, the same victim, the same night, the same thing.

MR. DRAKE: All right.

THE COURT: This was not a curfew case, I don't believe.

MR. DRAKE: No, and I would point out to the Court, under a subchapter of the Tribal Code entitled "assaults", there appears a section 273, "Indecent assault on child", referring to "Any Indian who shall assault a child under the age of 18 years and take indecent liberties on the person of such child with or without the child's consent shall be deemed guilty of this offense." And I would submit to the Court that that is what Mr. Kleinschmidt hopes that the contributing to the delinquency of a minor charge is.

THE COURT: Mr. Kleinschmidt?

MR. KLEINSCHMIDT: If it please the Court, first I would like to say that the Defendant's Exhibit B is, inadvertently, a simultaneous conviction for disorderly conduct, and I meant and would now like to have these marked. They are certified copies of the conviction for contributing to the delinquency of a minor, if they can be marked as Defendant's C.

(Defendant's Exhibit C marked for identification.)

THE COURT: Okay.

[13] MR. KLEINSCHMIDT: Your Honor, Mr. Drake makes a point that, in the Tribal Code, contributing to the delinquency of a minor is not a very distinct charge, and that is true. Then he goes on to say that because the defendant was charged with something—could have been charged with something else and wasn't, that this isn't the same offense.

The point is that the—it makes very clear as to time and place and exactly what the situation was with the defendant. He was convicted. He pled guilty to a lesser included offense of exactly what he is charged with here, and I submit that it is double jeopardy.

[13] THE COURT: I think that it has come up in another division of the District Court before in the exact same circumstances and the exact same double jeopardy was held. I think it was one of your cases, in fact, a few years back.

MR. KLEINSCHMIDT: Your Honor, I know on varying facts it has been in this court, in the District Court at Phoenix, and such a motion has been both granted and denied in Judge Craig's court. Neither was my case, but when it was denied, it was on a different set of facts, is my understanding. There was factually quite a disparity between what the [14] defendant—or the circumstances under which he pled guilty in the Tribal Court and here.

I am aware of a case of Mr. Karas' in Judge Craig's court where the charge was assault with a dangerous weapon or one of the assault charges in the federal court, and the defendant had pled guilty to disorderly conduct in the Tribal Court and it was shown that that disorderly conduct was the assault which the defendant was charged with in the federal court, and under those circumstances I am aware of the dismissal.

THE COURT: That was the one that I had in mind and it was dismissed on a double jeopardy basis.

MR. KLEINSCHMIDT: Yes, Your Honor.

THE COURT: Well, I don't think the Court has any choice in the matter. The indictment will be dismissed on the basis that the defendant has already once been placed in jeopardy for the same offense.

(Proceedings concluded.)

Supreme Court of the United States

No. 76-1629

UNITED STATES,

Petitioner,

v.

ANTHONY ROBERT WHEELER

ORDER ALLOWING CERTIORARI. Filed October 3, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ..... Circuit is granted.